IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 329 of 1980

For Approval and Signature:

Hon'ble MISS JUSTICE R.M. DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

YUSUFMIYA A SAIYAD,SINCE DIED THROUGH HIS HEIRS:

Versus

STATE OF GUJARAT

Appearance:

MR MC SHAH for Petitioners

MR ST MEHTA AGP for Respondent No. 1

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 30/08/2000

ORAL JUDGEMENT

This appeal arises of the judgment and order dated 28th August, 1980 passed by the learned District Judge, Mehsana in Regular Civil Appeal No. 98 of 1978 arising of the judgment and decree dated 30th September, 1977 passed in Regular Civil Suit No. 179 of 1975. The appellant before this Court is the original plaintiff.

The subject matter of the suit is a piece of open land admeasuring 137.70 sq.yards bearing Tikka No. 71, Chalta No. 212, renumbered as Survey No. 3291, situated at Vijapur, Taluka Vijapur, District Mehsana. The plaintiff claimed the ownership of the suit land and prayed for a declaration that the plaintiff was the owner and in possession of the suit land. The plaintiff also challenged the order of the Collector, Mehsana dated 19th August, 1969 made in Revenue Appeal No. 80 of 1969 and the judgment and order dated 18th September, 1972 of the Gujarat Revenue Tribunal in GRTA No. 627 of 1971. The suit was defended by the Defendants-State Government by filing written statement at Exh. 19.

It appears that a city survey was introduced in the Town of Vijapur in the year 1964. The city survey Inquiry Officer, after recording the statement of the plaintiff, issue a Sanad declaring that the suit land was of the ownership and of possession of the plaintiff. The said Sanad was challenged in Revenue Appeal No. 14 of 1968 by one Imdad Husein before the Deputy District Collector under Section 203 of the Bombay Land Revenue Code, 1879 [hereinafter referred to as, `the Code']. Said Shri Imdad Husein claimed that the lands bearing Chalta No. 154, 231 and 212 were erroneously declared to be of the ownership of the Vijapur Nagar Panchayat, the State Government and Shri Yusufmiya [Plaintiff-Appellant] respectively. Said Shri Imdad Husein lodged his claim of ownership in the above referred appeal. The said appeal was decided by the Dy. District Collector on 24th March, 1969. As regards the land bearing Chalta No. 212 [the suit land], the Deputy District Collector observed that the city survey Inquiry Officer had recorded the ownership of Yusufmiya Abasmiya [Plaintiff-Appellant] by inheritance and since the plaintiff was in possession, his ownership was believed. It is further observed that the suit land was part of the larger piece of land admeasuring 5090 sq. yards which was held to be the Government land. The claim of the ownership of the appellant Imdad Husein was, therefore, rejected. The Deputy District Collector further observed that the suit land was part of the larger piece of land admeasuring 5090 sq. yards which was held to be the Government land and no Sanad could have been issued in respect of the Government land. He, therefore, directed an inquiry to be made as regards the Sanad that might have been granted to the private persons in respect of the pieces of land out of the said Government land. The said decision was challenged by Imdad Husein before the District Collector in Revenue Appeal No. 80 of 1969. While deciding the

said appeal, the District Collector held that the suit land was declared to be the Government land and no Sanad could have been issued in favour of the plaintiff. He, therefore, directed that the suit land be entered in the revenue records as the Government land. Feeling aggrieved, the above referred Imdad Husein preferred the appeal being G.R.T.A No. 165 of 1969 before the Gujarat Revenue Tribunal and the plaintiff preferred the revision being G.R.T.A No. 627 of 1971 before the said Tribunal. The learned Tribunal has recorded that the Vijapur was formerly a part of the Baroda State till its merger with the State of Bombay in the year 1949. The suit land was governed by the Land Revenue Code of the erstwhile State of Baroda. The learned Tribunal referred to the order dated 23rd May, 1943 made by the Administrator, Vijapur in respect of the land admeasuring 5090 sq. yards which was held to be of the ownership of Kazumiya Pannumiya and Saiyed Husein Fazal Husein, the farther of the Appellant-Imdad Husein and Iqbal Husein. The said order of 23rd May, 1943 was set-aside in revision by the Deputy Collector, Vijapur Division on 21st October, 1943 which was confirmed by the Collector by his order dated 9th December, 1944. Feeling aggrieved, father of the appellants ie., Saiyed Husein had filed original Civil Suit No. 22/1944-45 in the District Court at Mehsana for declaration of the ownership of the said piece of land admeasuring 5090 sq. yards. The suit was dismissed on 25th February, 1946. The judgment and decree were confirmed by the Baroda High Court on 30th January, 1947 in Appeal No. 66 of 1945-46 and was further confirmed by the Baroda Privy Council on 14th March, 1949 in Hajur Extra-Civil Application No. 21 of 1947-48. The Tribunal further held that the suit land bearing Chalta No. 212 [re-numbered as Survey No. 3291] was included in the plot of land admeasuring 5090 sq.yards. Accordingly, the Tribunal dismissed the appeal preferred by the above referred Imdad Husein and Iqbal Husein and also the revision preferred by the plaintiff. Therefore, the suit.

The learned trial Judge allowed the suit and passed a decree declaring that the plaintiff was the owner of the suit land and set-aside the orders dated 19th August, 1969 passed in Revenue Appeal No. 80 of 1969 and 18th September, 1972 passed by the Gujarat Revenue Tribunal in G.R.T.A No. 627 of 1971. Feeling aggrieved, the State Government preferred above appeal no. 98 of 1978 which was allowed by the lower Appellate Court; as recorded hereinabove. Feeling aggrieved, the plaintiff has preferred the present Second Appeal.

Mr. M.C Shah, the learned advocate appearing for the appellant has relied upon the map Exh. 33. He has submitted that the suit land is a small piece of land admeasuring 137.7 sq. yards abutting on the public road. The premises being Survey No. 3292, 3293 and 3295 adjacent to the suit land abut on the suit land and the only access to the said houses is through the suit land. The said houses are of the ownership of the plaintiff and are being used by him and his family. The said houses are otherwise land locked and have no other entrance. The plaintiff and his ancestors were the owners of the suit land and the adjoining houses for times immemorial and have been using the same. Mr. Shah has, therefore, submitted that even by presumption, the suit land should be declared to be of the ownership of the plaintiff. He has submitted that the plaintiff has deposed before the Court that the suit land is in his possession and is being used by him. This statement of the plaintiff has not been controverted and the same should be believed. He has also submitted that the lower appellate Court has grossly erred in relying upon the judgment in the original Suit No. 22 of 1944-45 and the judgments confirming the said judgment. He has submitted that neither the plaintiff nor his ancestors, through whom he claims the right of ownership, was party to the said litigation and the said judgments were not admissible in evidence. Even if the said judgments are admissible in evidence, the contents thereof are not binding to the plaintiff. In support of his contentions, he has relied upon Sections 41 to 44 of the Evidence Act and Section 37 of the Code. He has also relied upon the judgment of this Court in the matter of Parmar Gogji Kana v. Parmar Ganesh Moti [IX GLR 1061] and of the Bombay High Court in the matter of Mahamadsaheb Ibrahimsaheb v. Tilokchand Abheerchand Marwadi [XXIV BLR 373]. As regards the admissibility of the judgments, he has relied upon the judgement of the Hon'ble Supreme Court in the matter of State of Bihar & Ors. v. Sri Radha Krishna Singh & Ors., [AIR 1983 SC 684] and of the Bombay High Court in the matter of Ramaji Batanji v. Manohar Chintaman & Ors. [AIR 1961 Bombay 169]. He has also drawn my attention to the decision rendered by the Hon'ble Supreme Court in the matter of Tirumala Tirupati Devasthanams v. K.M Krishnaiah [(1998) 3 SCC 331].

Section 37 (1) of the Code provides inter alia, that, `all lands wherever situated, which are not the property of the individuals or of aggregates of persons legally capable of holding property, and except in so far as any right of such persons may be established in or over the same and except as may be otherwise provided in

any law for the time being in force, are and are hereby declared to be, with all rights, in or over the same, or appertaining thereto, the property of the Government'. In the matter of Parmar Gogji Kana [Supra], this Court relying upon the judgment of the Bombay High Court in the matter of Mahamadsaheb Ibrahimsaheb [Supra] held that, `..The plaintiff has no document of title to show ownership over the open space in front of the defendant's house. The user of the defendant of that space shows his ownership over the same and there can be no claim of plaintiff's adversely holding it. But as observed in the case referred to hereinabove, the possession of open sites naturally goes with the possession of the property to which they appertain. No other person can have ownership over the front portion of somebody's house.' In the matter of Mahamadsaheb Ibrahimsaheb [Supra], on the similar facts, the Court held that, `the plaint sites lie adjacent to and appurtenant to the shop which certainly would not be necessary for him to preserve evidence that ever since the date of his purchase he was in active possession of those open sites. Possession of those sites would naturally go with the possession of the shop.' In the matter of State of Bihar & Ors. [Supra], the Hon'ble Supreme Court had an occasion to examine the admissibility of various judgments in evidence. Considering the scheme of the Evidence Act, the Hon'ble Supreme Court in paragraph 121 to 123 of the judgment held that, `..where there is a specific provision covering the admissibility of a document, it is not open to the Court to call into aid other general provisions in order to make a particular document admissible. In other words, if a judgment is not admissible as not falling within the ambit of Sections 40 to 42, it must fulfil the conditions of Section 43 otherwise it cannot be relevant under Section 13 of the Evidence Act. The words `other provisions of this Act' cannot deal with judgments at all.... It is also well settled that a judgment in rem like judgments passed in probate, insolvency, matrimonial or guardianship or other similar proceedings, is admissible in all cases whether such judgments are inter partes or not. ..... It is now settled law that judgments not inter partes are inadmissible in evidence barring exceptional cases which we shall point out hereafter.' The Court summarized the principles in paragraph 143 of the judgment as follows :-

> `143. Thus, summarizing the ratio of the authorities mentioned above, the position that emerges and the principles that are deductible from the aforesaid decisions are as follows :-

(1) A judgment in rem eg., judgments or orders passed in admiralty, probate proceedings, etc. would always be admissible irrespective of whether they are inter partes or not.

(2) Judgments in personam not inter partes are not at all admissible in evidence except for the three purposes mentioned above.

(3) On a parity of the aforesaid reasoning the recitals in a judgment like findings given in appreciation of evidence made or arguments or genealogies referred to in the judgment would be wholly inadmissible in a case where neither the plaintiff nor the defendant were parties.

(4) The probative value of documents which, however, ancient they may be, do not disclose sources of their information or have not achieved sufficient notoriety is precious little.

(5) Statements, declarations or depositions, etc., would not be admissible if they are post litem motam.'

Similarly, in the matter of Ramaji Batanji [Supra], the Bombay High Court has held that, `a judgment in another suit which is not inter partes may be evidence under Section 13 of the Evidence Act for certain purposes, namely, to prove the fact of the judgment; to show who the parties to the suit were; to show what was the subject matter of the suit; to show what was decided or declared by the judgment; to show what documents had been filed by the parties in the proceedings; to establish the transaction referred to in the judgment; as evidence to show the conduct of the parties or particular instances of the exercise of a right or assertion of title or to identify property; or to show how property had been previously dealt with; to establish a particular transaction in which a right is asserted and the name of the person, if any, who is declared in the judgment as entitled to possession; but the judgment is not evidence to establish the truth of the matters decided in that judgment.'

In the matter of Tirumala Tirupati Devasthanams

[Supra] precisely the same issue came-up before the Hon'ble Supreme Court for consideration. In the said case, the appellant had obtained a decree for title in the suit property against the third party one Hathiramji Mutt in the year 1947 which was relied upon by the Devasthanams in support of their claim to title. The judgment and decree in the earlier litigation against Hathiramji Mutt was admitted in evidence and was relied upon by the trial Court as well as the lower appellate Court for dismissing the suit against Devasthanams. A question was raised before the Hon'ble Supreme Court whether the said judgment not inter partes was admissible in evidence. The Court considering various previous judgments of the Hon'ble Supreme Court and the Privy Council held that the previous judgments, not inter partes, was admissible in evidence under Section 13 to show who the parties were; what lands in dispute were and who was declared entitled to retain them. It was further held that Devasthanams could rely on the previous judgment as evidence to prove its title in regard to the suit property even though the plaintiff therein was not a party to the earlier suit. Mr. Shah has also relied upon the judgment of the Allahabad High Court in the matter of Sita Ram v. Nanku & Ors. [AIR 1928 Allh. 16]. In the said matter, the Court found that the courts below had failed to draw presumption of fact under Section 114 of the Evidence Act. The Court held that, `...My conclusion then is that a second appeal lies on the ground of the failure of the lower appellate Court to invoke a presumption of fact `of the stronger kind' [by which I mean inferences of the nature illustrated in Sec. 114, Evidence Act and inferences that in English law would be legal presumptions], and that there is even authority for holding that the failure of the lower appellate Court to draw any mere inference that it should have drawn would justify interference in second appeal, though I would not follow authority to this extent. The consequence is that in this case a second appeal, in my opinion, lie." Mr. Shah has submitted that the plaintiff had proved his possession and use to the suit land and a presumption of title ought to have been raised as had been done by this Court and the Bombay High Court in the matters of Parmar Gogji Kana [Supra] and of Mahamadsaheb Ibrahimsaheb [Supra]. The first appellate Court having failed to do so, the second appeal shall lie. The questions that arise for consideration are whether the judgments in the original Suit No. 22 of 1944-45, in Appeal No. 66 of 1945-46 and Hajur Extra-Civil Application No. 21 of 1947-48 were admissible in evidence and whether first appellate Court was right in relying upon the decisions rendered therein; and whether,

the lower appellate Court ought to have upheld the plaintiff's title to the suit land, the land being appurtenant to his house and he being in possession and use of the same for times immemorial.

The plaintiff has asserted that the suit land and adjoining houses belong to his forefathers since 18th Century and he has inherited the same from his ancestors. The suit land was of his ownership and he was using the same. The evidence of the plaintiff in this respect has not been controverted. It is also not disputed that the houses adjoining the suit land do belong to the plaintiff. Having regard to the location of the suit land, it is indisputable that it is the only passage through which the plaintiff had an access to his houses. Ordinarily, therefore, a presumption should arise that land appurtenant to the houses of the plaintiff should belong to the plaintiff. The plaintiff was not required to put forth any further evidence to prove his usage of the suit land. In my view, therefore, the first appellate Court was not right in insisting that the plaintiff should have adduced further evidence to prove his usage of the suit land.

The relevancy of the judgments of the courts of justice have been provided for in Sections 40 to 43 of the Indian Evidence Act, 1872. Section 40 speaks of the judgments which operate as res judicata and prevents the Court from taking cognizance of a suit. Section 41 provides for relevancy of judgments in rem, like in exercise of probate, matrimonial, Admiralty or insolvency jurisdiction. Section 42 provides for relevancy of orders or decrees other than those mentioned in Section 41 which relate to matters of a public nature relevant to the inquiry. Section 43 refers to relevancy of the judgments other than those mentioned in Sections 40 to 43 Such judgments are held irrelevant unless the existence of such judgment, order or decree, is a fact in issue or is relevant under some other provision of the act. As held in the matter of Sri Radha Krishna Singh & Ors. [Supra], the judgment in a previous suit would not be admissible in evidence unless it is relevant under any of the Sections 40 to 43 of the Act ie., the judgment which is not inter partes, is held to be inadmissible in evidence. However, considering the judgment of the Hon'ble Supreme Court in the matter of Tirupati Tirumala Devasthanams [Supra] and the line of judgments referred to therein, such judgments are held to be admissible in evidence under Section 13 of the Act as proof of existence of a title to the property. In the present case also, in the previous suit filed by the ancestors of

Imdad Husein and Iqbal Husein, the Government was declared to be the owner of piece of land admeasuring 5090 sq.yards and judgments rendered in the suit and the appeals arising of the said suit can well be relied upon by the Government to assert its title to the land. The judgments would be admissible in evidence to that extent. However, the contentions therein or the statements of fact made therein would not be admissible in evidence as the same does not fall in either of the Sections 40 to 43 of the Act nor can it fall under Section 13 of the Act, since the same cannot be said to be a transaction or an instance as envisaged in Section 13 of the Act. It must, therefore, be held that the previous judgments rendered in the suit instituted by Imdad Husein and Iqbal Husein and appeals arising therefrom were admissible in evidence in proof of the fact that the Government had a title over the land admeasuring 5090 sq. yards which was the subject matter in the suit. However, the decision therein or the facts stated therein would not be admissible in evidence. The first appellate Court, therefore, has erred in relying upon the decision in the previous judgments and in deciding the appeal entirely on the said decision. Besides, the first appellate Court has also failed to appreciate the challenge. What was challenged before the learned Trial Judge were the orders of the District Collector and the Revenue Tribunal. The question whether the plaintiff had the title over the suit lands or not was not the subject matter of consideration before the Collector or the Revenue Tribunal. The District Collector and the Revenue Tribunal were examining whether the appellant Imdad Husein and Iqbal Husein had a title over the suit land or not. Unless the plaintiff was called upon to establish his title over the suit land, or the plaintiff's possessary title was not questioned, the suit land could not have been declared to be the Government land vis-a-vis the plaintiff. It is equally true that no documentary evidence has comeforth to establish the title of the plaintiff to the suit land. In view of the title of the Government having been accepted, in the previous suit, the trial Court ought to have remanded the matter to the authority below to ascertain whether the suit land was the part of the land admeasuring 5090 sq. yards which was the subject matter of the previous judgment as ordered by the Deputy District Collector in his order of 24th March, 1969.

In above view of the matter, the appeal is partly allowed with costs. The judgement and order of the First Appellate Court as well as the judgment and decree passed by the trial Court are quashed and set-aside. The order

of the District Collector in Revenue Appeal No. 80 of 1969 made on 19th August, 1969 and the judgment and order dated 18th September, 1972 of the Gujarat Revenue Tribunal in GRTA No. 627 of 1971 also are quashed and set-aside. The order of the Deputy District Collector of 24th March, 1969 made in Revenue Appeal No. 14 of 1968 is restored.

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Prakash*